



6450-01-P

DEPARTMENT OF ENERGY

48 CFR Parts 925, 952 and 970

RIN 1991-AB99

Acquisition Regulations: Export Control

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is adopting as final, with changes, a rule amending the Department of Energy Acquisition Regulation (DEAR) to add clauses regarding applicable export control requirements for DOE contracts. The rule recognizes contractor responsibilities to comply with all applicable export control laws and regulations in the performance of DOE contracts and prescribes Export Clauses to address these responsibilities.

DATES: *Effective Date:* [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability Date: This final rule is applicable to solicitations issued on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose and Legal Authority

B. Summary of Major Provisions

1. Part 925--FOREIGN ACQUISITION.

2. Part 952--SOLICITATION PROVISIONS AND CONTRACT
CLAUSES.

3. Part 970--DOE MANAGEMENT AND OPERATING CONTRACTS.

II. Summary of Comments and Responses

III. Procedural Requirements.

A. Review under Executive Orders 12866 and 13563.

B. Review under Executive Order 12988.

C. Review under the Regulatory Flexibility Act.

D. Review under the Paperwork Reduction Act.

E. Review under the National Environmental Policy Act.

F. Review under Executive Order 13132.

G. Review under the Unfunded Mandates Reform Act of 1995.

H. Review under the Treasury and General Government Appropriations Act, 1999.

I. Review under Executive Order 13211.

J. Review under the Treasury and General Government Appropriations Act, 2001.

K. Review under Executive Order 13609.

L. Approval by the Office of the Secretary of Energy.

I. Executive Summary

A. Purpose and Legal Authority

The purpose of this rulemaking is to add new DEAR Subparts 925.71 and 970.2571 to clarify requirements concerning compliance with export control laws and regulations applicable in the performance of DOE contracts.

Export control laws and regulations that may apply to a DOE contract include, but are not limited to: the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*), as amended; the Arms Export Control Act (22 U.S.C. 2751 *et seq.*); the Export Administration Act of 1979 (50 U.S.C. app. 2401 *et seq.*), as continued under the International Emergency Economic Powers Act (Title II of Pub. L. 95-223, 91 Stat. 1626, October 28, 1977); Trading with the Enemy Act (50 U.S.C. App. 1 *et seq.* as amended by the Foreign Assistance Act of 1961); Assistance to Foreign Atomic Energy Activities (10 Code of Federal Regulations (CFR) Part 810); Export Administration Regulations (15 CFR Parts 730 through 774); International Traffic in Arms Regulations (22 CFR Parts 120 through 130); Export and Import of Nuclear Equipment and Material (10 CFR Part 110); and regulations administered by the Office of Foreign Assets Control of the Department of the Treasury (31 CFR Parts 500 through 598).

DOE provided summaries of these export control laws in section II of its proposed rule. See 78 FR 35195 (June 12, 2013).

B. Summary of Major Provisions

DOE is amending the DEAR to add provisions similar to the 2013 amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) (DFARS 225, Foreign Acquisition, and DFARS 252, 78 FR 36108, June 17, 2013); DFARS 252, Foreign

Acquisition, 78 FR 48331, August 8, 2013; and to the DFARS Procedures, Guidance, and Information (PGI) 225 “Foreign Acquisition” (revised June 26, 2013).

1. PART 925--FOREIGN ACQUISITION

Part 925 is amended by adding new section 925.71 to set forth requirements for contractors concerning compliance with U.S. export control laws and regulations.

Points of contact and specific U.S. government agency requirements for export controls can be found as follows:

Department of Commerce (DOC):

<http://www.bis.doc.gov/licensing/exportingbasics.htm>

Department of Energy, National Nuclear Security Administration, Office of Nonproliferation and International Security:

<http://nnsa.energy.gov/aboutus/ourprograms/nonproliferation/programoffices/officenonproliferationinternationalsecurity>.

Nuclear Regulatory Commission: <http://www.nrc.gov/about-nrc/ip/export-import.html>.

Department of State: http://www.pmddtc.state.gov/about/key_personnel.html and http://www.pmddtc.state.gov/documents/ddtc_getting_started.pdf.

Department of Treasury: <http://www.treasury.gov/services/Pages/Foreign-Transaction-Licensing-and-Reporting.aspx>.

DOE contractors are responsible for complying with export control requirements applicable to their contracts as set forth in new DEAR Export Clauses. It is a contractor's

responsibility to comply with all applicable export control laws and regulations. This responsibility exists independent of, and is not established or limited by, this DEAR rulemaking.

2. PART 952 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Part 952 is amended by adding new clause 952.225-71 to set forth requirements for DOE contractors concerning compliance with applicable export control laws and regulations.

Points of contact and specific U.S. government agency requirements for export controls can be found as follows:

Department of Commerce (DOC):

<http://www.bis.doc.gov/licensing/exportingbasics.htm>

Department of Energy, National Nuclear Security Administration, Office of Nonproliferation and International Security:

<http://nnsa.energy.gov/aboutus/ourprograms/nonproliferation/programoffices/officenonproliferationinternationalsecurity>.

Nuclear Regulatory Commission: <http://www.nrc.gov/about-nrc/ip/export-import.html>.

Department of State: http://www.pmddtc.state.gov/about/key_personnel.html and http://www.pmddtc.state.gov/documents/ddtc_getting_started.pdf.

Department of Treasury: <http://www.treasury.gov/services/Pages/Foreign-Transaction-Licensing-and-Reporting.aspx>.

DOE contractors are responsible for complying with export control requirements applicable to their contracts as set forth in new DEAR Export Clauses. It is a contractor's responsibility to comply with all applicable export control laws and regulations. This

responsibility exists independent of, and is not established or limited by, this DEAR rulemaking.

3. PART 970 - DOE MANAGEMENT AND OPERATING CONTRACTS

Subpart 970.25 is amended by adding new section 970.2571 to set forth requirements for management and operating contractors concerning compliance with applicable export control laws and regulations. Subpart 970.52 is amended by adding new clause 970.5225-1 to set forth requirements for management and operating contractors concerning compliance with applicable export control laws and regulations.

Points of contact and specific U.S. government agency requirements for U.S. export controls can be found as follows:

Department of Commerce (DOC):

<http://www.bis.doc.gov/licensing/exportingbasics.htm>.

Department of Energy, National Nuclear Security Administration, Office of Nonproliferation and International Security:

<http://nnsa.energy.gov/aboutus/ourprograms/nonproliferation/programoffices/officenonproliferationinternationalsecurity>.

Nuclear Regulatory Commission: <http://www.nrc.gov/about-nrc/ip/export-import.html>.

Department of State: http://www.pmddtc.state.gov/about/key_personnel.html and http://www.pmddtc.state.gov/documents/ddtc_getting_started.pdf.

Department of Treasury: <http://www.treasury.gov/services/Pages/Foreign-Transaction-Licensing-and-Reporting.aspx>.

DOE management and operating contractors are responsible for complying with export control requirements applicable to their contracts as set forth in new DEAR Export Clauses. It is the contractor's responsibility to comply with all applicable export control laws and regulations. This responsibility exists independent of, and is not established or limited by, this DEAR rulemaking.

II. Summary of Comments and Responses.

DOE published a notice of proposed rulemaking (NOPR) on June 12, 2013 (78 FR 35195). The NOPR reflected the approach previously taken by the Department of Defense (DoD) in the Defense Acquisition Regulations Supplement (DFARS) to address requirements for complying with export control laws and regulations when performing DoD contracts. DOE has received recommendations from the General Accounting Office and the DOE Inspector General to modify the DEAR for the same purpose. DOE received comments from 15 organizations in response to the NOPR. In addition, within days of publication of the NOPR, the DoD revised the DFARS to address issues similar to those reflected in comments received on the NOPR and provided guidance relating to the release of fundamental research information. This final rule reflects the approach taken by the DoD on June 17, 2013, to changes to sections 225.79 and 252.225-7048 of the DFARS (Foreign Acquisition, 78 FR 36108), and to changes to Part 225 of the DFARS PGI – 225.79 (Foreign Acquisition, Export Control). This NOPR also reflects DoD guidance in 78 FR 48331, August 8, 2013, related to the release of research information that may be export controlled.

The following paragraphs describe the changes included in this final rule as a result of those comments and provide DOE's response to the comments received.

Summary of changes to the NOPR

- a) All notification and reporting requirements have been removed.
- b) The requirement for contractors to comply with DOE directives "in effect on the date of the contract award" has been removed.
- c) References to "transfers" have been removed.
- d) References to specific DOE Orders have been removed.
- e) The Export Restriction Notice has been removed from the Export Clauses.
- f) The phrase "subject to export controls" has been removed from the Export Clauses.
- g) All listings of U.S. export control laws and regulations are preceded by, "include, but are not limited to:"
- h) All references to "export-controlled items" and "export control of items" have been removed. The rule addresses "compliance with export control laws and regulations" and does not attempt to define what is and is not export controlled.

Discussion of comments and responses.

- 1. Comment:** Six respondents claimed that export control laws exist and already apply to U.S. persons, regardless of whether a contractor represents to DOE that it is complying with applicable export laws.

Response: As stated in the NOPR, export compliance responsibilities exist independent of and are not established or limited by the proposed rule. It is customary practice for

laws and regulations applicable to DOE contracts to be listed in the contracts. In addition, DOE is requiring the new Export Clauses to be added to all applicable contracts. Listing applicable export laws and regulations in the Export Clauses will help ensure that contractors are aware of their responsibilities, emphasize the importance to DOE of contractor compliance with such laws and regulations, and minimize the risk of non-compliance with U.S. laws and regulations that could have major programmatic and financial impacts on DOE and contractors. No change was made to the text as a result of this comment.

2. **Comment:** Six respondents claimed that the rule encroaches on the export authority of other U.S. export licensing authorities.

Response: The rule does not affect the export authority of any U.S. Government agency. The purpose of the rule is to direct DOE contractors to seek guidance from and to communicate with export licensing officers at export licensing agencies and not to ask DOE Contracting Officers for assistance in complying with export control requirements. The rule provides explicit instructions to DOE Contracting Officers, if asked by a DOE contractor to provide export assistance, to direct contractors to applicable export laws and regulations and to the agencies administering them. The final rule makes it clear that DOE does not have an export compliance officer overseeing DOE contractor export activities, and that contractors are responsible for compliance with export controls. No change was made to the text as a result of this comment.

3. **Comment:** Four respondents claimed the proposed rule has existing or potential inconsistencies with export control authorities.

Response: As noted above, the purpose of the rule is to direct DOE contractors to seek guidance from and to communicate with export licensing officers at export licensing agencies and not to ask for export control compliance assistance from DOE Contracting Officers. The final rule has been revised to remove reporting and marking requirements, as well as language cited by one respondent as potentially inconsistent with other authorities.

4. **Comment:** One respondent expressed concern as to how differences of opinion on the applicability of export control requirements between agencies responsible for administering the laws and the DOE Contracting Officer would be resolved.

Response: The rule makes clear that DOE Contracting Officers do not make any decisions regarding the applicability of export control laws or regulations. The appropriate licensing agency determines whether export control requirements apply. It is a contractor's responsibility to adhere to all relevant export control laws and regulations. No change was made to the text as a result of this comment.

5. **Comment:** One respondent claimed that DOE is potentially setting up a conflict for a contractor between complying with changes in export laws and regulations that are not yet changed in its contract clause.

Response: The listing of export control laws and regulations in the Export Clauses in the final rule are preceded by "include, but are not limited to:". Any changes in U.S. export laws or regulations would apply to a contractor because the Export Clauses require compliance with all applicable export control laws and regulations. No change was made to the text as a result of this comment.

- 6. Comment:** Two respondents alleged that the proposed rule is inconsistent with the Export Control Reform Initiative.

Response: The final rule is consistent with the Export Control Reform Initiative (ECRI). The purpose of this rule is to simplify the export process for DOE contractors, by directing them to the proper export licensing authorities. Reporting requirements have been removed from the final rule.

- 7. Comment:** Three respondents claimed that the proposed rule is redundant to DEAR 970.5204-2 Laws, Regulations and DOE Directives, because that clause adequately covers compliance with export laws and regulations.

Response: The rule clarifies DOE contractor and Contracting Officer responsibilities regarding export controls not clearly stated in any other law or regulation. The Export Clauses clarify that DOE contractors are to contact appropriate export licensing agencies and not DOE Contracting Officers with questions regarding export control compliance. The Export Clauses direct DOE Contracting Officers to address contractor export control questions by directing them to relevant export control laws and regulations and licensing agencies. No change was made to the text as a result of this comment.

- 8. Comment:** One respondent questioned the requirement for contractors to comply with DOE directives “in effect on the date of the contract award,” as individual DOE contracts specify applicable DOE directives for each DOE contract.

Response: DOE acknowledges that contracts specify applicable DOE directives. This language has been removed from the final rule.

- 9. Comment:** Two respondents claimed that DOE already has adequate contractual enforcement tools.

Response: The purpose of the rule is not to provide additional enforcement tools. This rule is needed to clarify DOE contractor and Contracting Officer export control responsibilities not clearly stated in any other law or regulation. No change was made to the text as a result of this comment.

10. Comment: Six respondents claimed that export control requirements are not needed in the DEAR and that the Federal Acquisition Regulation (FAR) limits agency acquisition regulations to those necessary to implement FAR policies and procedures.

Response: The final rule provides necessary policies and procedures not included in the FAR. It clarifies that DOE contractors are to consult appropriate export licensing agencies and not DOE Contracting Officers with questions regarding export compliance. The final rule directs DOE Contracting Officers to handle export control questions posed by contractors by directing the contractors to the relevant export licensing agencies. This rule is needed to clarify DOE contractor and DOE Contracting Officer responsibilities that are not clearly stated in any other law or regulation. No change was made to the text as a result of this comment.

11. Comment: Six respondents claimed that the proposed rule exceeds the stated purpose of the rule, which is to amend the DEAR for consistency with a 2010 amendment to the DFARS. They said that the proposed rule is not consistent with the revised DFARS clauses.

Response: The final rule reflects the approach taken in the June 17, 2013, changes to 225.79 and 252.225-7048 of the DFARS (Foreign Acquisition, 78 FR 36108) and to the June 17, 2013 changes to Part 225.79 of the DFARS PGI-225 (Foreign Acquisition). No change was made to the text as a result of this comment.

12. Comment: Three respondents claimed that the proposed rule is ineffective as a way to respond to 2004 and 2007 DOE Inspector General (IG) and 2011 Government Accountability Office (GAO) reports on DOE contractor non-compliance with export laws.

Response: The rule responds to DOE IG and GAO recommendations in the cited reports for DOE to provide specific export control guidance to DOE contractors. In particular, the 2007 DOE IG report recommended that DOE “ensure that export control guidance is disseminated and implemented throughout the complex.” To implement that recommendation, the IG report stated that “NNSA management should expedite action, such as issuing a directive or modifying the Department of Energy Acquisition Regulation (DEAR), to fully implement the open recommendation.” The 2011 GAO report repeated its prior recommendations for DOE to provide guidance to its contractors. The proposed rule is in direct response to the DOE IG recommendation to modify the DEAR, as well as the recommendations in the GAO report. No change was made to the text as a result of this comment.

13. Comment: Two respondents claimed that the proposed rule unfairly asks Contracting Officers to make export control decisions for which they are not trained. One respondent proposed rewording the requirement for Contracting Officers to insert the export control clause as follows: “The Contracting Officer shall insert the clause at 952.225-71, Compliance with export control laws, regulations and directives (Export Clause), in all solicitations and contracts.”

Response: The purpose of the new rule is to set forth the responsibilities of DOE contractors and DOE Contracting Officers concerning contractor compliance with export-

controlled activities. Contracting Officers are required to include the Export Clause at DEAR 952.225-71 or DEAR 970.5225-1 in solicitations and contracts that would involve export-controlled activities. While the rule has been revised to be applicable to “all solicitations and contracts,” export control laws would not be applicable to solicitations and contracts that do not involve export-controlled activities. As noted above, the revised language is similar to the policy approach taken DoD.

14. Comment: Nine respondents claimed that certain reporting requirements included in the Export Clauses would unduly burden DOE contractors because the requirement of a timely, written notification of export controls and compliance for DOE contracts would be an overbroad approach to ensuring export control compliance. Also, the requirement to flow down the reporting requirement would impose administrative and audit burdens on contractors.

Response: The final rule removes the requirements for a contractor to notify the DOE Contracting Officer when the contract may require export activities and for a contractor to assure the DOE Contracting Officer of its ability to comply with U.S. export laws and regulations. The reporting and notification requirements in the proposed rule were not required by any law or regulation, or recommended by any auditors. The purpose of the Export Clauses is to clarify that DOE contractors should consult appropriate export licensing agencies, and not DOE Contracting Officers, with questions regarding compliance with export-controlled activities. The reporting and notification requirements were removed from the rule to avoid any implication that DOE Contracting Officers have any export compliance responsibilities.

15. Comment: Two respondents were concerned about the impact on small business subcontractors and universities.

Response: U.S. export control laws and regulations already apply to activities conducted by small businesses and by universities that have DOE contracts, so there would be no substantive change regarding export control requirements applicable to these entities. No change was made to the text as a result of this comment.

16. Comment: Three respondents claimed that the proposed rule is not consistent with National Security Decision Directive (NSDD) -189 because “products” most often generated and disseminated while performing fundamental research are scientific findings excluded from export regulations under the “Fundamental Research Exclusion” set forth in NSDD-189 and the exclusion of fundamental research from export controls in EAR and ITAR provisions.

Response: NSDD 189 establishes a national policy that, to the maximum extent possible, the products of fundamental research shall remain unrestricted. NSDD 189 provides that no restrictions may be placed upon the conduct or reporting of federally funded fundamental research that has not received national security classification, except as provided in applicable U.S. statutes. As a result, contracts confined to the performance of unclassified fundamental research generally do not involve any export-controlled activities. NSDD 189 does not take precedence over statutes. As it clearly states in the directive, NSDD 189 does not exempt any research from statutes that apply to export control laws and regulations. In addition, NSDD 189 is focused on the products of fundamental research and does not exempt access to export-controlled technology used or generated during the conduct of fundamental research. The final rule therefore is

consistent with NSDD-189 regarding fundamental research because it does not have an impact on the NSDD-189 exemption for fundamental research and it does not modify restrictions already imposed by U.S. export control laws and regulations on research.

DFARS PGI-225.79 (revised June 17, 2013) and [the final rule on the release of fundamental research information in DFARS 252.204-7000 (August 8, 2013) address release of fundamental research information]. Note that the revised DFARS PGI-225 places reporting requirements on contractors who want to release information that they have determined to be the product of fundamental research. This final rule does not place any reporting requirements on the release of fundamental research by DOE contractors.

17. Comment: Two respondents questioned the scope of the Export Restriction Notice requirement.

Response: The Export Restriction Notice requirement has been removed from the final rule because requirements for the use of such a notice are defined in 41 CFR § 109 and do not need to be restated in this rule.

18. Comment: Three respondents recommended that DOE would be better served by providing educational materials to contractors to increase export compliance awareness.

Response: The purpose of the new rule is to direct DOE contractors to seek guidance from and to communicate with export licensing officers at appropriate export licensing agencies, and not to ask for export control compliance assistance from DOE Contracting Officers. Compliance training offices of Department of Commerce, Department of State and other agencies provide appropriate training on their respective export regulations.

No change was made to the text as a result of this comment.

19. Comment: Two respondents believed that DOE may inadvertently assume liability because of requirements in the Export Clauses should a contractor be in non-compliance with export control requirements.

Response: DOE will not assume any liability due to inclusion of the Export Clauses in contracts or for contractor noncompliance with export control requirements. No change was made to the text as a result of this comment.

20. Comment: Eight respondents claimed that the proposed rule potentially increases DOE contractors' risk by specifically listing regulations in the contract. They also were concerned that contractors could be liable under the False Claims Act and other laws for their actions or for those of their subcontractors. If the contractor is not in compliance with export control regulations, it may also be subject to Qui Tam penalties, and the rule would make failure to comply with export regulations a contractual obligation. This liability may be assumed by the M&O contractor for all of its subcontractors, including lower-tier subcontractors.

Response: The Export Clauses in the final rule do not require reporting or written assurances. Contractors will not assume new liabilities due to insertion of the Export Clauses in DOE contracts.

21. Comment: One respondent claimed that the proposed rule potentially increases DOE contractors' risk by requiring the contractor to identify specific aspects of the contract governed by export laws.

Response: For the reasons stated previously, reporting and written assurance requirements have been removed from the final rule.

22. Comment: One respondent claimed that adoption of the proposed regulation would increase costs for DOE procurements.

Response: For the reasons stated previously, reporting requirements and written assurances have been removed from the final rule. The only *de minimis* costs associated with the final rule are costs to add the Export Clauses to solicitations and contracts. No further change was made to the text as a result of this comment.

23. Comment: One respondent believed that the rule affects 10 CFR Part 810 procedures for contractors subject to that regulation.

Response: The proposed rule does not affect implementation of 10 CFR Part 810 with respect to DOE program activities. No change was made to the text as a result of this comment.

24. Comment: One respondent claimed that DOE Contracting Officers will be required to submit all DOE contracts to the Office of Nonproliferation and International Security (NIS) of the National Nuclear Security Administration for 10 CFR Part 810 review.

Response: The reporting requirements have been removed from the revised rule. The rule does not place any requirements on DOE Contracting Officers to submit contracts to the office now called the Office of Nonproliferation and Arms Control for 10 CFR Part 810 review. No change was made to the text as a result of this comment.

25. Comment: Two respondents asked that this rule to be pursued in conjunction with the revised 10 CFR Part 810.

Response: The final rule amending 10 CFR Part 810 (part 810) was issued on February 23, 2015. 80 FR 9359 (Feb. 23, 2014). The purpose of that final rule and this final rule are different. Part 810 controls the export of unclassified nuclear technology and

assistance, and is one of the export rules that may apply to contractors. It was revised to, among other things, reflect current global civil nuclear trade practices. The purpose of this rule final is to direct DOE contractors to seek guidance from and to communicate with export licensing officers at export licensing agencies regarding export rules such as 10 CFR Part 810. No change was made to the text as a result of this comment.

26. Comment: Two respondents stated that the meaning of “transfer” is not clear.

Response: References to “transfers” have been removed from the final rule.

27. Comment: One respondent stated that the list of items to be transferred that are subject to the Notice is ambiguous.

Response: The Export Restriction Notice has been removed from the rule.

28. Comment: One respondent pointed out that DOE cites obsolete and unavailable references with regard to DoD directives. For instance, DOE lists DOE Order 580.1A which directs the reader to follow requirements in a DoD Demilitarization Manual 4160.21-M-1, that was cancelled and replaced. In addition, the replacement (DoD 4160.28-M series) directs users to obtain disposal guidance for ITAR items from websites that are available only to DoD components or those with .mil email addresses.

Response: References to specific DOE Orders in the rule have been removed.

References in the NOPR were current at the time that it was published.

29. Comment: Six respondents recommended that the rule more closely follow the DoD example in the revised DFARS.

Response: The final rule has been revised consistent with June 17, 2013, changes to sections 225.79 and 252.225-7048 of the DFARS and the DFARS PGI-225.

30. Comment: One respondent disagreed with the implication in the Export Restriction Notice that all items are subject to export controls.

Response: The Export Restriction Notice has been removed from the final rule. As noted above, the phrase “subject to export controls” has been removed from the Export Clauses.

III. Procedural Requirements.

A. Review under Executive Orders 12866 and 13563.

Today’s regulatory action has been determined not to be a “significant regulatory action” under Executive Order 12866, “Regulatory Planning and Review,” (58 FR 51735, October 4, 1993). Accordingly, this rule is not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to, and explicitly reaffirms the principles, structures, and definitions governing, regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including

potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. DOE believes that today's final rule is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a reasoned determination that its benefits justify its costs and, in choosing among alternative regulatory approaches, those approaches maximize net benefits.

B. Review under Executive Order 12988.

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction.

With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law; these proposed regulations meet the relevant standards of Executive Order 12988.

C. Review under the Regulatory Flexibility Act.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of a regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990 (February 19, 2003), DOE has made its procedures and policies available on the Office of the General Counsel’s website (<http://energy.gov/gc/office-general-counsel>).

DOE certifies that this rule would not have a significant impact on a substantial number of small entities because the rule is intended only to recognize existing export control compliance obligations and to clarify the role of DOE and its contracting officers in relation to these requirements. The rule itself does not impose any new requirements on manufacturers. In addition, DOE notes that the reporting requirements referenced in the proposed rule have been eliminated from the final rule for the reasons discussed in response to the comments received on this issue. DOE transmitted this certification to the Small Business Administration (SBA) as required by 5 U.S.C. 605(b).

D. Review under the Paperwork Reduction Act.

This final rule does not impose a collection of information requirement subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* DOE's procurement reporting and recordkeeping burdens have been approved under OMB Control No. 1910-4100.

E. Review under the National Environmental Policy Act.

DOE has concluded that promulgation of this final rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by DOE's regulations (10 CFR Part 1021, Subpart D) implementing the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this final rule is categorically excluded from NEPA review because the amendments to the DEAR are strictly procedural (categorical exclusion A6). Therefore, this final rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

F. Review under Executive Order 13132.

Executive Order 13132, 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined today's rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

G. Review under the Unfunded Mandates Reform Act of 1995.

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104—4) generally requires a Federal agency to perform a detailed assessment of costs and benefits of any rule imposing a Federal Mandate with costs to State, local or tribal governments, or to the private sector, of \$100 million or more. This rulemaking does not impose a Federal mandate on State, local or tribal governments or on the private sector.

H. Review under the Treasury and General Government Appropriations Act, 1999.

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277), requires Federal agencies to issue a Family Policymaking Assessment for any rule or policy that may affect family well being. This rule will have no impact on family well-being. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review under Executive Order 13211.

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use”, 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution and use. Today's rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

J. Review under the Treasury and General Government Appropriations Act, 2001.

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under implementing guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review under Executive Order 13609.

Executive Order 13609 of May 1, 2012, “Promoting International Regulatory Cooperation,” requires that, to the extent permitted by law and consistent with the principles and requirements of Executive Order 13563 and Executive Order 12866, each Federal agency shall:

- (a) If required to submit a Regulatory Plan pursuant to Executive Order 12866, include in that plan a summary of its international regulatory cooperation activities that are reasonably anticipated to lead to significant regulations, with an explanation of how these activities advance the purposes of Executive Order 13563 and this order;
- (b) Ensure that significant regulations that the agency identifies as having significant international impacts are designated as such in the Unified Agenda of Federal Regulatory and Deregulatory Actions, on RegInfo.gov, and on Regulations.gov;
- (c) In selecting which regulations to include in its retrospective review plan, as required by Executive Order 13563, consider:
 - (i) Reforms to existing significant regulations that address unnecessary differences in regulatory requirements between the United States and its major trading partners, consistent with section 1 of this order, when stakeholders provide adequate information to the agency establishing that the differences are unnecessary; and
 - (ii) Such reforms in other circumstances as the agency deems appropriate; and
- (d) For significant regulations that the agency identifies as having significant international impacts, consider, to the extent feasible, appropriate, and consistent with law, any regulatory approaches by a foreign government that the United States has agreed to consider under a regulatory cooperation council work plan.

DOE has reviewed this final rule under the provisions of Executive Order 13609 and determined that the rule complies with all requirements set forth in the order.

L. Approval by the Office of the Secretary of Energy.

The Office of the Secretary of Energy has approved issuance of this final rule.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 48 CFR Parts 925, 952 and 970

Government procurement

Issued in Washington, DC, on: October 8, 2015.

Patrick Ferraro,
Director
Office of Acquisition Management
Department of Energy

For reasons set out in the preamble, the DOE is amending Chapter 9 of Title 48 of the Code of Federal Regulations as set forth below.

PART 925--FOREIGN ACQUISITION

1. The authority citation for Part 925 continues to read as follows:

Authority: 42 U.S.C. 7101 *et seq.*, and 50 U.S.C. 2401 *et seq.*

2. Subpart 925.71 is added to Part 925 to read as follows:

Subpart 925.71 - Export Control

Sec.

925.7100 Scope of subpart.

925.7101 Policy.

925.7102 Contract clause.

Subpart 925.71 - Export Control

925.7100 Scope of subpart.

This subpart implements Department of Energy (DOE) requirements for contractors concerning compliance with U.S. export control laws and regulations.

925.7101 Policy.

(a) DOE and its contractors must comply with all applicable U.S. export control laws and regulations.

(b) Export control laws and regulations include, but are not limited to, the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*), as amended; the Arms Export Control Act (22 U.S.C. 2751 *et seq.*); the Export Administration Act of 1979 (50 U.S.C. app. 2401 *et seq.*), as continued under the International Emergency Economic Powers Act (Title II of Pub. L. 95-223, 91 Stat. 1626, October 28, 1977; 50 U.S.C. 1701 *et seq.*); Trading with the Enemy Act

(50 U.S.C. App. 5(b), as amended by the Foreign Assistance Act of 1961); Assistance to Foreign Atomic Energy Activities (Title 10 of the Code of Federal Regulations (CFR) Part 810); Export Administration Regulations (15 CFR Parts 730 through 774); International Traffic in Arms Regulations (22 CFR Parts 120 through 130); Export and Import of Nuclear Equipment and Material (10 CFR Part 110); and regulations administered by the Office of Foreign Assets Control of the Department of the Treasury (31 CFR Parts 500 through 598).

(c) Contractors seeking guidance on how to comply with export control laws and regulations should review the illustrative list of laws and regulations set forth in Clause 952.225-71.

Contractors also may contact the agencies responsible for administration of export laws or regulations applicable to a particular export (e.g., Departments of State, Commerce, Treasury and Energy, or the Nuclear Regulatory Commission).

(d) DOE Contracting Officers will not answer contractor questions regarding how to comply with U.S. export laws and regulations. Contracting Officers should direct contractors to the export laws, regulations, and agencies cited in the Export Clause at section 952.225-71 of this subpart.

(e) It is the contractor's responsibility to comply with all applicable export control laws and regulations. This responsibility exists independent of, and is not established or limited by, this subpart.

925.7102 Contract clause.

The Contracting Officer shall insert the clause at 952.225-71, Compliance with Export Control Laws and Regulations (Export Clause), in all solicitations and contracts.

PART 952 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. The authority citation for Part 952 continues to read as follows:

Authority: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

4. Section 952.225-71 is added to read as follows:

952.225-71 Compliance with export control laws and regulations (Export Clause)

As prescribed in 925.7102, use the following clause:

**COMPLIANCE WITH EXPORT CONTROL LAWS AND REGULATIONS (NOV
2015)**

(a) The Contractor shall comply with all applicable export control laws and regulations.

(b) The Contractor's responsibility to comply with all applicable export control laws and regulations exists independent of, and is not established or limited by, the information provided by this clause.

(c) Nothing in the terms of this contract adds to, changes, supersedes, or waives any of the requirements of applicable Federal laws, Executive Orders, and regulations, including but not limited to--

(1) The Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*), as amended;

(2) The Arms Export Control Act (22 U.S.C. 2751 *et seq.*);

(3) The Export Administration Act of 1979 (50 U.S.C. app. 2401 *et seq.*), as continued under the International Emergency Economic Powers Act (Title II of Pub. L. 95-223, 91 Stat. 1626, October 28, 1977; 50 U.S.C. 1701 *et seq.*);

(4) Trading with the Enemy Act (50 U.S.C. App. 5(b), as amended by the Foreign Assistance Act of 1961);

(5) Assistance to Foreign Atomic Energy Activities (10 CFR Part 810);

(6) Export and Import of Nuclear Equipment and Material (10 CFR Part 110);

(7) International Traffic in Arms Regulations (ITAR) (22 CFR Parts 120 through 130);
(8) Export Administration Regulations (EAR) (15 CFR Parts 730 through 774); and
(9) The regulations administered by the Office of Foreign Assets Control of the Department of the Treasury (31 CFR Parts 500 through 598).

(d) In addition to the Federal laws and regulations cited above, National Security Decision Directive (NSDD) 189, National Policy on the Transfer of Scientific, Technical, and Engineering Information, establishes a national policy that, to the maximum extent possible, the products of fundamental research shall remain unrestricted. NSDD 189 provides that no restrictions may be placed upon the conduct or reporting of federally funded fundamental research that has not received national security classification, except as provided in applicable U.S. statutes. As a result, contracts confined to the performance of unclassified fundamental research generally do not involve any export-controlled activities.

NSDD 189 does not take precedence over statutes. NSDD 189 does not exempt any research from statutes that apply to export controls such as the Atomic Energy Act, as amended; the Arms Export Control Act; the Export Administration Act of 1979, as amended; or the U.S. International Emergency Economic Powers Act, or regulations that implement parts of those statutes (e.g., the ITAR, the EAR, 10 CFR Part 110 and 10 CFR Part 810). Thus, if items (e.g., commodities, software or technologies) that are controlled by U.S. export control laws or regulations are used to conduct research or are generated as part of the research efforts, export control laws and regulations apply to the controlled items.

(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all solicitations and subcontracts.

[End of clause]

PART 970 - DOE MANAGEMENT AND OPERATING CONTRACTS

5. The authority citation for Part 970 continues to read as follows:

Authority: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

6. Subpart 970.25 is revised to read as follows:

Subpart 970.25--Foreign Acquisition

Sec.

970.2570 Buy American Act.

970.2570-1 Contract clause.

970.2571 Export control.

970.2571-1 Scope of subpart.

970.2571-2 Policy.

970.2571-3 Contract clause.

Subpart 970.25--Foreign Acquisition

970.2570 Buy American Act.

970.2570-1 Contract clause.

Contracting officers shall insert the clauses at 48 CFR 52.225-1, Buy American Act—

Supplies, and 48 CFR 52.225-9, Buy American Act--Construction Materials, in management and operating contracts. The clause at 48 CFR 52.225-1 shall be modified in paragraph (d) of this section by substituting the word “use” for the word “deliver.”

970.2571 Export control.

970.2571-1 Scope of subpart.

This subpart implements DOE requirements for DOE management and operating contractors concerning compliance with U.S. export control laws and regulations.

970.2571-2 Policy.

(a) DOE and its contractors must comply with all applicable export control laws and regulations.

(b) Export control laws and regulations include, but are not limited to, the Atomic Energy Act of 1954, as amended; the Arms Export Control Act (22 U.S.C. 2751 *et seq.*); the Export Administration Act of 1979 (50 U.S.C. app. 2401 *et seq.*), as continued under the International Emergency Economic Powers Act (Title II of Pub. L. 95-223, 91 Stat. 1626, October 28, 1977; 50 U.S.C. 1701 *et seq.*); Trading with the Enemy Act (50 U.S.C. App. 5(b), as amended by the Foreign Assistance Act of 1961); Assistance to Foreign Atomic Energy Activities (Title 10 of the Code of Federal Regulations (CFR) Part 810); Export Administration Regulations (15 CFR Parts 730 through 774); International Traffic in Arms Regulations (22 CFR Parts 120 through 130); Export and Import of Nuclear Equipment and Material (10 CFR Part 110); and regulations administered by the Office of Foreign Assets Control of the Department of the Treasury (31 CFR Parts 500 through 598).

(c) Contractors seeking guidance on how to comply with export control requirements should review the illustrative list of laws and regulations applicable to the export of unclassified information, materials, technology, equipment or software set forth in clause 970.5225-1. Contractors also may contact the agencies responsible for administration of export laws and regulations applicable to a particular export (e.g., Departments of State, Commerce, Treasury and Energy, or the Nuclear Regulatory Commission).

(d) The contracting officer will not answer any questions a contractor may ask regarding how to comply with export regulations. If asked, the contracting officer should direct the contractor to export regulations and agencies cited in the Export Clause at 970.5225-1.

(e) It is the contractor's responsibility to comply with all applicable U.S. export control laws and regulations. This responsibility exists independent of, and is not established or limited by, this subpart.

970.2571-3 Contract clause.

The Contracting Officer shall insert the clause at 970.5225-1, Compliance with Export Control Laws and Regulations (Export Clause), in all solicitations and contracts.

Subpart 970.52--Solicitation Provisions and Contract Clauses for Management and Operating Contracts

7. Section 970.5225-1 is added to read as follows:

970.5225-1 Compliance with export control laws and regulations (Export Clause).

As prescribed in 970.2571-3, use the following clause:

COMPLIANCE WITH EXPORT CONTROL LAWS AND REGULATIONS (NOV 2015)

(a) The Contractor shall comply with all applicable U.S. export control laws and regulations.

(b) The Contractor's responsibility to comply with all applicable laws and regulations exists independent of, and is not established or limited by, the information provided by this clause.

(c) Nothing in the terms of this contract adds to, changes, supersedes, or waives any of the requirements of applicable Federal laws, Executive Orders, and regulations, including but not limited to--

- (1) The Atomic Energy Act of 1954, as amended;
- (2) The Arms Export Control Act (22 U.S.C. 2751 *et seq.*);
- (3) The Export Administration Act of 1979 (50 U.S.C. app. 2401 *et seq.*), as continued under the International Emergency Economic Powers Act (Title II of Pub. L. 95-223, 91 Stat. 1626, October 28, 1977; 50 U.S.C. 1701 *et seq.*);
- (4) Trading with the Enemy Act (50 U.S.C. App. 5(b), as amended by the Foreign Assistance Act of 1961);
- (5) Assistance to Foreign Atomic Energy Activities (10 CFR Part 810);
- (6) Export and Import of Nuclear Equipment and Material (10 CFR Part 110);
- (7) International Traffic in Arms Regulations (ITAR) (22 CFR Parts 120 through 130);
- (8) Export Administration Regulations (EAR) (15 CFR Parts 730 through 774); and
- (9) Regulations administered by the Office of Foreign Assets Control (31 CFR Parts 500 through 598).

(d) In addition to the Federal laws and regulations cited above, National Security Decision Directive (NSDD) 189, National Policy on the Transfer of Scientific, Technical, and Engineering Information establishes a national policy that, to the maximum extent possible, the products of fundamental research shall remain unrestricted. NSDD 189 provides that no restrictions may be placed upon the conduct or reporting of federally funded fundamental research that has not received national security classification, except as provided in applicable U.S. statutes. As a result, contracts confined to the performance of unclassified fundamental research generally do not involve any export-controlled activities.

NSDD 189 does not take precedence over statutes. NSDD 189 does not exempt any research from statutes that apply to export controls such as the Atomic Energy Act, as amended; the

Arms Export Control Act; the Export Administration Act of 1979, as amended; or the U.S. International Emergency Economic Powers Act; or the regulations that implement those statutes (e.g., the ITAR, the EAR, 10 CFR Part 110 and 10 CFR Part 810). Thus, if items (e.g., commodities, software or technologies) that are controlled by U.S. export control laws or regulations are used to conduct research or are generated as part of the research efforts, the export control laws and regulations apply to the controlled items.

(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all solicitations and subcontracts.

[End clause]

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